No. [redacted]

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ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term [redacted]

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FOX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TERRITORIAL FARMERS COOPERATIVE,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

[redacted]

QUESTIONS PRESENTED FOR REVIEW

1. Is a writ of mandamus appropriate when the Member-Owners have sought to appeal the Bankruptcy Court's decision to the District Court for the Northern District of Illinois?

2. Is the Bankruptcy Court's assertion of jurisdiction so incorrect that the issuance of a writ of mandamus is appropriate?

3. Should this Court stay its judgment in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858 (1982), beyond October 4, 1982?

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In the
Supreme Court of the United States

OCTOBER 1982 TERM

No. 82-440

In re **FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FCX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE,**

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Energy Cooperative, Inc., Debtor and Debtor in Possession ("ECI"), seven banks[1] who are creditors of ECI,

[1] The banks are: (1) Continental Illinois National Bank and Trust Company of Chicago, acting on its own behalf, as agent for Seattle-First National Bank, First National Bank of Minneapolis, First National Bank and Trust Company of Oklahoma City, Bank of Montreal (California), and the First National Bank of Boston, and as security agent for St. Louis Bank for Cooperatives; (2) Seattle-First National Bank; (3) First National Bank of Minnea-

(footnote continued)

Sonatrach[2] and the Official Committee of Unsecured Creditors of ECI submit this brief in opposition to the Member-Owners'[3] petition for a writ of mandamus.[4]

SUMMARY OF ARGUMENT

A fundamental requirement for the issuance of a writ of mandamus is that the party seeking the writ must have no other adequate means to attain the relief he desires. Because the Member-Owners have the right to seek immediate, direct review of the Bankruptcy Court's order in the United States District Court for the Northern District of Illinois ("the District Court")—a right they have exercised—they have an adequate means to attain the relief they desire and are foreclosed from obtaining the extraordinary remedy of mandamus.

In addition, the Member-Owners' interpretation of this Court's opinion in *Northern Pipeline Construction Co.* v.

(footnote continued)

polis; (4) First National Bank and Trust Company of Oklahoma City; (5) Bank of Montreal (California); (6) First National Bank of Boston; and (7) St. Louis Bank for Cooperatives. ECI and the banks are plaintiffs in Adversary Proceedings No. 81A 3286 in the Bankruptcy Court and counterclaim-defendants in Adversary Proceeding No. 81 A 2075 in that Court.

[2] Sonatrach is the commonly used abbreviation for Societe Nationale Pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures. Sonatrach is the counterclaim plaintiff in Adversary Proceeding No. 81 A 2075.

[3] The Member-Owners are the stockholders of Energy Cooperative, Inc. They are defendants in Adversary No. 81 A 3286 and third party defendants in Adversary No. 81 A 2075.

[4] The statement required by Supreme Court Rule 28.1 is contained in Respondents' Response to Petitioners' Motion for an Expedited Determination.

Marathon Pipeline Co., 102 S. Ct. 2858 (1982) (*"Northern Pipeline"*), is contrary to the opinion's plain language. This Court held flatly that "we stay our judgment," yet the Member-Owners assert that the Court's judgment has not been stayed in its entirety. The Member-Owners also ask this Court to hold that part of the jurisdiction conferred by the Bankruptcy Act of 1978 ("the Bankruptcy Act") is constitutional and part is not, a result inconsistent with this Court's conclusion that Section 241(a) of the Act cannot be severed.

Finally, this Court should reject the Member-Owners' suggestion that this Court should not extend the stay of its judgment in *Northern Pipeline* beyond October 4, 1982 if Congress fails to restructure the Bankruptcy Act by that date. If this Court's stay were not extended, the bankruptcy courts after October 4 would not be able to exercise *any* of their jurisdiction. Such a result would impose an enormous hardship on debtors and creditors throughout the nation.

ARGUMENT

"[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (per curiam) (1980). The party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Will* v. *United States*, 389 U.S. 90, 96 (1967), citing *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953). Thus, writs of mandamus should "*hardly* ever" be granted. *Allied, supra*, 449 U.S. at 36 (emphasis in original).

As we shall demonstrate, this case does not present the extraordinary circumstances necessary for mandamus.[5] The petition should be denied both because the ordinary appellate process provides the Member-Owners with an adequate means of review and because their interpretation of *Northern Pipeline* is clearly incorrect.

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[5] The Member-Owners seek a writ of certiorari to the United States Court of Appeals for the Seventh Circuit if their petition for a writ of mandamus is denied. (Pet. at 13, n. 12). Because the Member-Owners have already sought mandamus from the Seventh Circuit, it would be more orderly to treat this proceeding as a petition for a writ of certiorari rather than for a writ of mandamus. If the petition is treated as one for a writ of certiorari, the Member-Owners have a double burden: first, they must show that the Seventh Circuit was incorrect in denying mandamus; and second, they must show that this case is of such urgency that the granting of certiorari is appropriate.

I.

A WRIT OF MANDAMUS SHOULD NOT BE GRANTED WHEN THE RIGHT TO SEEK AN IMMEDIATE APPEAL TO THE DISTRICT COURT IS AVAILABLE.

Pursuant to 28 U.S.C. § 1334(b),[6] the Member-Owners have asked the District Court for leave to appeal the Bankruptcy Court's interlocutory order denying their motion to dismiss or stay the proceedings in that court. The availability of such an immediate right to seek review renders a writ of mandamus from this Court inappropriate.

This Court has repeatedly held that a requirement for a writ of mandamus is "that the party seeking issuance of the writ have no other adequate means to attain the relief he desires. . . ." *Helstoski* v. *Meanor*, 442 U.S. 500, 505 (1979), citing *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Supreme Court Rule 26 reiterates this requirement, stating that the issuance "of any extraordinary writ authorized by 28 U.S.C. § 1651 is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that . . . adequate relief cannot be had in any other form or from any other court."[7] Writs of mandamus

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[6] 28 U.S.C. § 1334(b) provides:

> "The district courts for such districts [that do not have appellate panels appointed pursuant to 28 U.S.C. § 160] shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken."

Under Section 405(c)(2) of the Bankruptcy Act, the jurisdiction of the district courts and the courts of appeals to hear bankruptcy appeals during the transition period until April 1, 1984 is the same as it will be after that date.

[7] Supreme Court Rule 27.2(a) further requires that a petition for mandamus "set forth with particularity why the relief sought is not available in any other court."

"cannot be used as substitutes for appeals." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). In *Helstoski, supra*, this Court applied these principles and held that a constitutional challenge to the jurisdiction of the district court could not be maintained by a petition for a writ of mandamus when the petitioner had an immediate right of appeal. 442 U.S. at 506. The Member-Owners' right to seek an appeal here presents a similar barrier to mandamus.

To grant mandamus in this case would undermine the system of appellate review enacted by Congress in the Bankruptcy Act. Under that Act, parties are entitled to appeal final judgments and orders of the bankruptcy courts to both the district courts and the courts of appeals, but they are not permitted to appeal interlocutory orders beyond the district courts.[8] This Court should be reluctant to interfere with Congress' judgment that as to interlocutory orders a single level of review would minimize delays and is adequate to protect litigants against incorrect decisions by the bankruptcy courts.

Moreover, there is no reason to permit the Member-Owners to depart from the restrictions imposed by the ordinary appellate process. If the Bankruptcy Court's interpretation of *Northern Pipeline* and decision that it presently has jurisdiction were incorrect, that decision would be fully reviewable in the District Court, the Seventh Circuit, and this Court after any final judgment or order were entered by the Bankruptcy Court. The availability of adequate review after final judgment precludes the

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[8] See 28 U.S.C. §§ 1293(b), 1334(b); *In re Licek Potato Chip Co.*, 599 F.2d 181, 183 n.2 (CA7 1979); *In re Kutner*, 656 F.2d 1107, 1112 (CA5 1981). The substance of Sections 1293(b) and 1334(b) is applicable during the transition period until April 1, 1984 under Section 405(c)(2) of the Bankruptcy Act.

granting of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (per curiam) (1980). The Member-Owners' grievance does not rise above a claim that they will be put to unnecessary inconvenience and expense if the litigation proceeds. Such a claim is insufficient to justify mandamus. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). In any event, there will be little, if any, wasted effort involved in the continuation of the proceedings. For example, any depositions taken in this action would be useable in other federal courts or in state courts, if these proceedings are dismissed. See Fed. R. Civ. P. 32(a); Fed. R. Evid. 613, 801(d), 804(b)(1); Ill. Rev. Stat. ch. 110A, § 212(a)(1).[9] Documents produced in the proceedings would be similarly useable.

II.

THE BANKRUPTCY COURT HAS JURISDICTION UNDER NORTHERN PIPELINE.

A. The Plain Meaning of the Northern Pipeline Opinion Supports Jurisdiction.

Even if a writ of mandamus were not precluded by the existence of alternate avenues of relief, the Member-Owners do not have the required "clear and indisputable" right to the issuance of such a writ. To the contrary, the Member-Owners' position is inconsistent with a plain reading of the *Northern Pipeline* opinion. As the Member-Owners concede (Pet. at 9), the Court declared unconstitutional *all* of the jurisdictional grant contained in Section 241(a) of the Bankruptcy Act, 28 U.S.C. §§ 1471-

[9] Should the suits be brought in the Illinois courts, the state Circuit Court would be able to use the sworn depositions as if they were discovery depositions and thus use them for impeachment, as admissions of a party, or as affidavits for summary judgment purposes. Ill. Rev. Stat. ch. 110A, § 212(a)(1).

1482. While the case before the Court involved exclusively state law claims brought by the debtor against a third party, the Court expressly refused to hold that the bankruptcy courts as presently constituted could hear bankruptcy cases that did not involve such claims. Instead, the Court declined to sever Section 241(a) and declared that it was up to Congress to decide how to recast the Bankruptcy Act, stating:

> "In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis . . . . We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose."

102 S. Ct. at 2880 n. 40 (plurality opinion). Justices Rehnquist and O'Connor, in concurring in the judgment, also agreed that the statute was not severable. Id. at 2882.

After concluding that it could not sever Section 241(a) and that all of that provision was therefore unconstitutional, the Court stayed its judgment, stating:

> "However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. *See Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976); cf. *Georgia* v. *United States*, 411 U.S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U.S. 231, 235 (1966); *Maryland Comm.* v. *Tawes*, 377 U.S. 656, 675-676 (1964)." 102 S. Ct. at 2880.

In light of this language in the opinion, the Member-Owners' interpretation of *Northern Pipeline* cannot be sustained. Section 241(a) of the Bankruptcy Act requires the bankruptcy courts to exercise the jurisdiction set forth in that provision. Until and unless this Court enters an order or judgment restraining the exercise of that jurisdiction, the bankruptcy courts may—and indeed must—exercise it. As of now, this Court has not entered any such judgment or order. Rather, it expressly held that "we stay our judgment."[10] Consequently, there is *no* judgment of this Court in the *Northern Pipeline* case outstanding.

Notwithstanding the lack of *any* judgment, the Member-Owners are asking this Court to require the Bankruptcy Court to act as if a partial judgment in *Northern Pipeline* has been entered; they argue that the Bankruptcy Court should decline to exercise the portion of its Section 241(a) jurisdiction that requires the adjudication of state law claims while continuing to exercise the remainder of its Section 241(a) jurisdiction. Such a result would be wholly inconsistent with this Court's refusal to declare only a portion of Section 241(a) unconstitutional and the remainder of the statutory grant of jurisdiction constitutional. The Court declared *all* of Section 241(a) unconstitutional, stayed *all* of its judgment, and stated that it was up to Congress to decide how to recast the jurisdictional grant in the Bankruptcy Act during the interim period while the judgment was stayed. 102 S. Ct. at 2880 and n. 40. The Member-Owner's suggestion that some, but not all, of Section 241(a) is presently enforceable must be rejected in light of the Court's express holding on this subject.

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[10] "To 'stay' an order or decree means to hold it in abeyance, or refrain from enforcing it." *Black's Law Dictionary* 1267 (5th ed. 1979).

B. The Authority Cited in Northern Pipeline Demonstrates this Court's Intention to Permit the Bankruptcy Courts to Exercise Their Jurisdiction Through October 4, 1982.

That this Court intended for the bankruptcy courts to continue exercising their jurisdiction is demonstrated by the cases the Court cited in staying its judgment.

The first and most important of the cases cited, *Buckley* v. *Valeo*, 424 U.S. 1 (1976), had two holdings, only one of which is relevant to the issues in this case. In its first holding, the one not of concern here, the Court held that certain campaign expenditure limits violated the rights of candidates to freedom of speech. These provisions could not be enforced by any tribunal at any time, and the invalidation of them was therefore not stayed. In its second holding, the Court held that the Federal Election Commission, to the extent that it had been given power to enforce various substantative (and constitutional) provisions of the Federal Election Campaign Act, was improperly constituted under the Appointments Clause (Const., Art. III, §2, cl. 2). It is the latter holding that is the one relevant to this case, and it is the latter holding that was stayed so as to allow the Commission to operate during an interim period in which Congress would have an opportunity to cure the constitutional defects. The Court, indeed, stayed its holding in language almost identical to that used in *Northern Pipeline:*

> "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." 424 U.S. at 143.

The other cases cited in *Northern Pipeline* also permitted interim actions by unconstitutionally organized bodies. Thus, in *Georgia* v. *United States*, 411 U.S. 526 (1973), an unconstitutionally elected state house of representatives was permitted to remain in office and to act on an interim basis. Similarly, an unconstitutionally apportioned Georgia assembly was permitted to remain in office in *Fortson* v. *Morris*, 385 U.S. 231 (1966). Finally, this Court permitted an unconstitutionally apportioned Maryland legislature to sit for two years until the regularly scheduled 1966 elections in *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964).

In citing cases that permitted tribunals which had been unconstitutionally organized to proceed with their business pending legislative correction of the constitutional problems, this Court in *Northern Pipeline* made clear that it intended the bankruptcy courts to continue exercising their jurisdiction while Congress attempts to remedy Section 241(a).

III.

THIS COURT SHOULD EXTEND ITS STAY OF THE JUDGMENT IN NORTHERN PIPELINE BEYOND OCTOBER 4, 1982.

The Member-Owners argue that there is no reason for this Court to extend the stay of its judgment in *Northern Pipeline* beyond October 4, 1982 if Congress fails to restructure the Bankruptcy Act by that date. Apparently conceding that unless the stay is extended (or Congress acts) the bankruptcy courts would be without jurisdiction to hear *any* claims after October 4, they contend that such a result would be acceptable because the federal district courts could hear bankruptcy cases that do not involve state law claims while state courts could hear purely state law claims. (Pet. at 10-12).

Although the question of whether to extend the stay is not properly before the Court on this petition for a writ of mandamus, respondents feel compelled to respond to the unsound arguments raised by petitioners. Neither the district courts nor the state courts are equipped to handle the enormous volume of cases that are now being processed in the bankruptcy courts. As a practical matter, the Member-Owners' suggestion would, if accepted, cause the administration of bankruptcies in the United States to come to a halt. Such a result would cause severe prejudice to thousands of debtors and creditors throughout the nation.

In addition, the Member-Owners' suggestion that purely state law claims relating to bankruptcies can be heard by state courts ignores the primary reason that this Court declined to sever Section 241(a) of the Bankruptcy Act: to permit *Congress* to decide how to restructure that Act. If Congress decides to change the status of the bankruptcy judges so that they could hear state law claims without running afoul of this Court's decision in *Northern Pipeline*, it would be unfairly prejudicial to litigants who wish to bring such claims in the bankruptcy courts to compel them to file their claims elsewhere during the interim period before Congress had made its decision. Thus, this Court should extend its stay if Congress has not acted by October 4.[11]

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[11] This Court permitted a similar extension of its stay in *Buckley* v. *Valeo*. See 424 U.S. at 936.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied. Additionally, if the Member-Owners' petition is treated as a petition for a writ of certiorari, certiorari should be denied.

Respectfully submitted,

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